Supreme Court, U.S.
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92-1768

No. _____

In The

Supreme Court of the United States

October Term, 1992

STEVEN C. STREEBING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

WHETHER A FEDERAL TRIAL COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO DISMISS A DEFENDANT'S INDICTMENT WHERE A GOVERNMENT AGENT PROMISED THE DEFENDANT THAT HE WOULD NOT BE INDICTED IF HE COOPERATED WITH THE GOVERNMENT AND HE HAD COOPERATED WITH THE GOVERNMENT?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Steven C. Streebing, a private citizen and the respondent, the United States of America. There have been no other parties to this action.

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STEVEN C. STREEBING,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Steven C. Streebing, respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered on March 2, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit which is sought to be reviewed has been recommended for publication, but is not yet published; it is reprinted in the Appendix, p. A-1. The opinion and order of the trial judge is unpublished and is reprinted in the Appendix at p. A-46. The recommendation of the federal magistrate in the trial court is unreported and is reprinted in the Appendix at p. A-34.

JURISDICTION

The opinion of the United States Court of Appeals was entered on March 2, 1993, and this petition for certiorari is filed within 90 days of that date. The jurisdic-

tion of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment V:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * * .

This petition also involves the power of the federal courts to supervise law enforcement agents in the administration of criminal justice which is not constitutionally based but is an inherent power of the federal courts. See, e.g., *Elkins* v. *United* States, 364 U.S. 206 (1960); *McNabb* v. *United* States, 318 U.S. 332 (1973); *Rea* v. *United States*, 350 U.S. 214 (1956).

STATEMENT OF THE CASE

On August 24, 1989, F.B.I. Agent, Jay Sieger, Department of Health and Human Services Agent, John Pollock, and a security and investigation officer from General Dynamics Corporation showed up at the door of the defendant, Steven C. Streebing. Their purpose was to investigate whether Mr. Streebing had been operating a business from his home during the time that he was collecting disability and social security while on disability leave from General Dynamics.

Their interview with Agent Sieger was four hours long, and approximately the first hour and a half was videotaped by the defendant.[1] The videotape was intro-

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[1] **Although the taping was surreptitious, it was discovered during the interview by the F.B.I. agent who then demanded a copy**

(concluded on page 3)

duced as an exhibit in the trial court at a magistrate's hearing on a motion to dismiss brought by the defendant. A copy of the videotape will be supplied if the court requests the same pursuant to Rule 12.5. An excerpt from the videotape was also transcribed and filed by the defendant as an Appendix to his Objections to the Magistrate's Report and Recommendations. pp. A-40–A-43.

The questioning of Streebing initially involved his involvement with a software and music business. After he insisted he drew no compensation from either of these businesses and he claimed he was not "working," Agent Sieger threatened the defendant with criminal charges. The Agent stated:

> You're gonna be charged with mail fraud, for a scheme to defraud Aetna [the disability carrier for General Dynamics] and General Dynamics * * * .

Agent Sieger advised Streebing that he was in danger of being charged with "false statements to the United States Government," and that "We're going to go into the grand jury, ok, and we are going to present everything." After Streebing said he did not want them to charge him and that he would "like to just not even be involved in the whole mess, I want restitution or whatever," Agent Sieger told him there is an "easy way" or "hard way," and that if he did not cooperate, his "chicken-shit little case" would go to the "top of the pile."

Streebing then said he wanted to do things the easy way and that he wanted to resolve it "without going to court * * * ." Streebing was told the case could pro-

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(*continued from page 2*)

of the tape and who threatened to go to the local police to obtain a search warrant for the tape, if Streebing did not turn it over. Streebing ordered the agents to leave several times, but they did not leave.

ceed to grand jury and then trial or he could do it the easy way. When Streebing asked what the agents wanted, they stated that they wanted him to tell them very plainly that he had lied about his business activities because he knew he would not get benefits. When Streebing refused to admit that he lied on forms he filled out, the agent suggested that they should discontinue this discussion because Streebing did not want to resolve it "today." Streebing was told the case could be resolved that day if he would "play a different tune."

When asked what would happen to him, Agent Sieger then blurted out in a loud, emphatic voice:

> You're not gonna be indicted, you're not gonna be indicted.

Agent Sieger then tempered these remarks by saying less emphatically that the decision to prosecute would be the decision of the prosecutor, but added that if the agents walked out of Streebing's house without cooperation, Streebing would be indicted. He urged Streebing to "resolve it now."

Agent Sieger said to Streebing that because of what he was telling the agents during the interview, he apparently did not "want to resolve it at this time. You'd rather wait until after charges are brought against you and then resolve it." To which Streebing responded that he wished to resolve the matter at that time and Sieger said:

> You'd rather resolve it now. Then for you to resolve it with us right now, John, what you've got to tell us is, when I wrote none, I knew by writing none, that I would continue to receive Social Security benefits, and I also know that if I would have told them about the money I was making, I would not have received benefits. Ok,

> you know how to say that? And if you don't say it, we're gonna prove it differently.

Streebing then admitted that he stayed on Social Security as a cushion while he got his business going and admitted other incriminating facts.

The government filed an indictment in the District Court for the Eastern District of Michigan, on April 26, 1991, charging Streebing with nine counts of mail fraud and three counts of making false statements in connection with an alleged scheme to defraud the Social Security Administration and Aetna Life Insurance Company of disability benefits. p. A-24. Streebing, on or about June 13, 1991, filed a motion for evidentiary hearing and to suppress the statements as involuntary, and on or about June 15, 1991, filed a motion to dismiss the indictment, asking the court to enforce the promise of Agent Sieger that he was not going to be indicted if he cooperated. p. A-32. The motion was referred to a federal magistrate who reviewed the videotape of the conversation with Agent Sieger and Defendant Streebing, and on August 6, 1991, issued a report and recommendation in which he found the Agent's conduct "egregious if not overtly outrageous." p. A-35. The Magistrate also found that "statements made by the F.B.I. Agent can be regarded as a direct or implied promise that there would be no prosecution if Streebing cooperated." pp. A-36–A-37. The magistrate recommended that any statements of Streebing during the interview be suppressed because the Agent's conduct was "overbearing," "intimidating," and "coercive," but did not recommend that the indictment be dismissed because the Defendant had not demonstrated "prejudice" from the use of the statement, because he could find no "meeting of the minds," and thus no "agreement" not to prosecute, and because "such an extreme measure as dismissal" was not

required. p. A-37. Both parties objected to the magistrate's recommendations, the government objecting to suppression of the statement and the defendant objecting to the failure to recommend dismissal. On September 16, 1991, the district judge issued an opinion and order in which he refused to dismiss the indictment, because he found no prejudice to the defendant and because dismissal is "a drastic remedy." p. A-47. The district judge found the magistrate's recommendation to suppress the statement of August 24, 1989, moot, since both counsel for the government and defense counsel had stipulated that neither party would attempt to utilize any portion of Streebing's statement, and the court entered an order based on that stipulation. p. A-45.

After a jury trial, Streebing was convicted of 4 counts of mail fraud, acquitted of 4 counts of mail fraud, (1 count of mail fraud was dismissed by the government), and he was convicted of 3 counts of making false statements.

On January 24, 1992, the defendant was sentenced to five months incarceration on all counts, the sentences to run concurrent, with an additional five months in a federal corrections center during a period of supervised release on those counts covered by the Sentencing Guidelines. p. A-17.

The defendant filed a timely appeal to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit held on March 2, 1993, that the federal courts have the inherent power to dismiss a grand jury indictment as part of its supervisory powers, an inherent ability not specifically provided in the constitution or in an Act of Congress. p. A-6. However, the Sixth Circuit held that it was not appropriate for the district court to use its supervisory powers to dismiss the indictment in the instant case, finding that the defendant needed to

show substantial prejudice (other than being charged in the case), to show that the agent had actual authority to make a promise not to indict and that the defendant relied to his detriment on the promise. pp. A-7–A-10. The Sixth Circuit held that the defendant had failed to demonstrate any of these factors, and that the district judge had not erred in refusing to dismiss the indictment.[2] p. A-10.

On March 25, 1993, the Sixth Circuit stayed the mandate for thirty days pending the filing of this petition. p. A-49. A motion to extend that stay for thirty days more was filed on April 22, 1993, and granted on April 30, 1993.

REASONS FOR GRANTING THE WRIT

I.

WHERE A GOVERNMENT AGENT PROMISES A SUSPECT THAT HE WILL NOT BE INDICTED IF HE COOPERATES WITH THE GOVERNMENT, AND THE SUSPECT COOPERATES WITH THE GOVERNMENT, THE COURT SHOULD EXERCISE ITS SUPERVISORY POWERS AND DISMISS ANY SUBSEQUENT INDICTMENT BROUGHT AGAINST THAT SUSPECT.

The promise of Agent Sieger to the defendant Streebing that he would not be indicted, that he could resolve his case "today" if Streebing told Sieger what he wanted to hear, is the type of promise by a government agent that the federal courts have enforced by use of their supervisory powers over law enforcement agents involved in the administration of criminal justice in the federal courts.[3]

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2 The circuit court also reversed the judgment as to restitution, ordering a lower amount of restitution.

3 Although the government has contested the sufficiency of the promises of Agent Sieger in light of the ambiguity of some of

(*concluded on page 8*)

The inherent power of federal courts to supervise government prosecutions has been recognized by the United States Supreme Court throughout its history. In *McNabb* v. *United States*, *supra*, Justice Frankfurter took note of the courts' inherent powers:

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. 318 U.S. at 340.

Justice Frankfurter also recognized the necessity for the supervisory power as a touchstone of a free society and a necessity to curb law enforcement excesses:

> The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The compli-

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Sieger's remarks, and the Sixth Circuit questioned the validity of the promise in a footnote (footnote 5), noting that it is an "absurdity that the government would let someone go free of his guilt because he admits it," (p. A-9) the finding of the federal magistrate that "statements made by the F.B.I. agent can be regarded as a direct or implied promise that there would be no prosecution if Streebing cooperated" has been undisturbed by either the district court or the court of appeals.

> cated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. 318 U.S. at 343.

Pursuant to its supervisory powers, the federal courts may enjoin a federal agent from turning over illegally seized evidence to state officials, *Rea* v. *United States*, *supra*, may exclude evidence in federal court illegally seized by state agents, *Elkins* v. *United* States, *supra*, and may exclude the statement of a defendant who has been held in custody for too long a period of time by law enforcement agents. *McNabb* v. *United States*, *supra*. There are limits on the courts' supervisory powers, however, and the court may not, in exercise of its supervisory powers, suppress evidence illegally taken from a third party where the defendant has no standing to request suppression. *United States* v. *Payner*, 447 U.S. 727 (1980). Nor may the courts dismiss an indictment for post-indictment misconduct of government agents, where agents interviewed a defendant alone who was represented by counsel and attempted to influence the defendant to take action independently from his attorney. *United States* v. *Morrison*, 449 U.S. 361 (1980).

Where a government agent has promised that a defendant will not be prosecuted if he cooperates, several federal courts have utilized their inherent supervisory powers to enforce this promise where it has been broken and an indictment has been brought.

In *United States* v. *Rodman*, 519 F.2d 1058 (1st Cir. 1975), the United States Court of Appeals for the First Circuit upheld a district court's dismissal of an indictment where a Securities and Exchange Commission (SEC) agent had promised that a defendant would not be indicted if he gave statements to the SEC. The First

Circuit found the exercise of the court's supervisory powers over the administration of justice require dismissal of the indictment because of breach of the government's promise, citing *McNabb*, *supra* and *Mallory* v. *United States*, 354 U.S. 449 (1959).

The United States Court of Appeals for the Ninth Circuit has also upheld dismissal of an indictment where a defendant had entered into a cooperation agreement with government authorities and had been promised by an agent of the Drug Enforcement Administration (DEA) that he would not be prosecuted. *United States* v. *Carillo*, 709 F.2d 35 (1st Cir. 1983). The court found that a cooperation agreement with the government is analogous to a plea bargain agreement, which can be enforced by the court through the use of its inherent powers. See, *Santobello* v. *New York*, 404 U.S. 257 (1971).

The Fourth Circuit, in *United States* v. *Carter*, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933, held that the court had the inherent power to enforce a promise not to prosecute made in one district in order to bar a prosecution made in a second district, even though authorities in the second district had not been a party to the promise made in the first district. The inherent powers of the court, and fundamental fairness, required that the defendant, who had cooperated, be given the benefit of his bargain and not prosecuted further.

District court judges have also held that a defendant is entitled to strict enforcement of government promises made to him or her in return for his or her cooperation. In *United States* v. *Pascal*, 496 F. Supp. 313 (N.D.Ill. 1979), a district court judge in the Northern District of Illinois found that a defendant was entitled to enforcement of a DEA agent's promise not to prosecute in return for cooperation. In violation of their promise to the defendant, the DEA agents did not advise the

prosecutor of their recommendation that he not be prosecuted. Again citing *McNabb* v. *United* States, as well as *United States v. Rodman* (the First Circuit decision discussed *supra)* the district judge found prejudice to *Pascal* for being charged and an enforceable promise. The court stated:

> Broad considerations of public policy and the fair administration of justice require that this court exercise its supervisory powers in order to protect the integrity of the whole judicial process. Under the facts in this case, this court is left with no alternative except to dismiss the indictment with prejudice. 496 F. Supp. 320.

The district court judge dismissed Pascal's indictment with prejudice.

A federal judge in the Eastern District of Michigan also ordered strict enforcement of a government promise, a promise that a defendant would not be required to be involved in a subsequent prosecution if he cooperated. See, *In the Matter of Doe*, 410 F. Supp. 1163 (E.D. Mich. 1976).

A federal judge in South Carolina has also recognized the inherent power of the federal courts to enforce law enforcement promises not to prosecute, but did not dismiss an indictment because the evidence did not establish that such a promise had been made. *United States* v. *Barrett*, 390 F. Supp. 1022 (D.S.C. 1975).

While the courts that have enforced government promises not to prosecute by dismissing indictments have based their decisions on the inherent, supervisory powers of the courts, powers which are not based in the Constitution or acts of congress, there has clearly occurred in each of these cases a violation of the defendant's Fifth Amendment rights and privileges. Where a

government agent promises that a defendant will not be prosecuted in order to induce an incriminating statement, clearly the defendant's Fifth Amendment rights and privileges against self-incrimination have been violated by an inducement or promise and the resultant statement cannot be utilized at trial. See, e.g., *Grades* v. *Boles*, 398 F.2d 409 (4th Cir. 7968), wherein the Fourth Circuit Court of Appeals recognized that a promise not to prosecute resulted in a statement taken in violation of the Fifth Amendment which required suppression. In the instant case, the parties stipulated that no statements of Streebing would be admitted at the trial of the cause after a federal magistrate recommended that the statements be suppressed because of the "egregious" and "outrageous" conduct of the government agent. The violations of the defendant's Fifth Amendment rights and privileges that occurred here where a promise not to prosecute was made in order to induce a statement and where agents exercised coercive behavior while promising not to prosecute, is yet another reason why the courts should exercise their inherent and supervisory powers to dismiss any resultant indictment.

The Sixth Circuit Court of Appeals should have followed the decisions above, enforced the promise made to the defendant Streebing, and dismissed his indictment pursuant to the courts' supervisory powers and in order to protect his Fifth Amendment privileges. No prejudice need be shown to the defendant other than the fact that he is being charged as a result of his cooperation. The question of actual or apparent authority of an agent to make a promise was not found by any of the courts in the above cases to bar enforcement of a government agent's promise and is secondary to upholding the integrity of the criminal justice process. Where a promise is made to an individual by a government agent that he will not be prosecuted if he cooper-

ates, and the individual cooperates with the government, the courts cannot tolerate the government's violation of that promise by a subsequent prosecution.

II.

THERE IS A DIVERGENCE IN THE CIRCUIT COURTS AS TO WHETHER A PROMISE OF A GOVERNMENT AGENT NOT TO INDICT SHOULD BE STRICTLY ENFORCED, OR WHETHER THE PROMISE WILL NOT BE ENFORCED UNLESS THE DEFENDANT SHOWS SPECIFIC PREJUDICE, ACTUAL AUTHORITY OF GOVERNMENT AGENTS TO MAKE BINDING PROMISES, AND RELIANCE ON THE PROMISE.

In deciding this case, the United States Court of Appeals for the Sixth Circuit decided not to follow the cases discussed in the first section of this argument. Rather, the court followed a divergent line of cases developed by some circuit courts, in which those courts require that the defendant show some prejudicial use of statements that were made in consideration for a promise not to be charged, and further require that the defendant prove that the agent who made the promise not to prosecute had the actual authority to bind the government and the defendant relied on the promise to his detriment. This line of cases is demonstrated by the cases cited by the Sixth Circuit in its opinion, and principally by the decisions in *United States* v. *Talbot*, 825 F.2d 991 (6th Cir. 1987) *cert. denied*, 484 U.S. 1042 (1990); *United States* v. *Kettering*, 861 F.2d 675 (11th Cir. 1988); *United States* v. *Williams*, 780 F.2d 802 (9th Cir. 1986); *Johnson* v. *Lumpkin*, 769 F.2d 630 (9th Cir. 1985); and *United States* v. *Hudson*, 609 F.2d 1326 (9th Cir. 1979).

The logic of the courts who have required the defendant to demonstrate "actual authority" of government agents to bind the government with their promises have been severely criticized by those courts who have

strictly enforced government promises not to prosecute. The panel of the Fourth Circuit that decided *United States* v. *Carter*, *supra*, stated:

> The solution does not lie in formalisms about the express, implied or apparent authority of one United States Attorney, or his representative, to bind another United States Attorney and thus to visit a sixteen year sentence on a defendant in violation of a bargain he fully performed. There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government. 405 F.2d at 428.

The federal district judge in South Carolina in *United States* v. *Barrett*, *supra*, who refused to enforce a promise because the existence of the promise had not been established, nonetheless refused to accept the government's argument that because the promise had been made by a DEA agent, the promise should not be enforceable. The judge stated:

> There can be no distinction between promises made by prosecutors in the Attorney General's office and promises made by agents of the Drug Enforcement Administration. 390 F. Supp. at 1024.

The requirement of the Sixth Circuit that a defendant must show prejudice, (other than being charged) derives from their decision in *United States* v. *Talbot*, *supra*, which in turn relied on the decision of the Supreme Court in *United States* v. *Morrison*, *supra*. In *Morrison*, this Court held that post-indictment misconduct of a government agent was not sufficient to warrant the dismissal of an indictment pursuant to the

court's supervisory powers because there had been no prejudice to the defendant, and no violation of the defendant's constitutional rights. The petitioner suggests that reliance on *Morrison* to hold that the dismissal of an indictment for a pre-indictment promise not to prosecute requires some showing of prejudice is a misapplication of *Morrison*.[4] *Morrison* correctly concludes that government agent misconduct *after an indictment is brought*, no matter how egregious the misconduct, should not be sufficient to result in dismissal of an indictment as a mere punitive gesture in the absence of a significant violation of a constitutional right. However, a pre-indictment promise not to prosecute, as distinguished from post-indictment governmental misconduct, involves the word of the United States government that action will or will not be taken, and brings into question the integrity of the charging process. If the defendant has cooperated, he or she has relied upon the promise. A cooperating defendant who incriminates himself or herself in reliance on a promise that he or she will not be prosecuted clearly violates Fifth Amendment protections not to incriminate himself or herself. Where a waiver of Fifth Amendment rights is secured by a promise not to prosecute, enforcement of the promise is important so that the integrity of the government may be maintained.

The divergence in the courts as to the standard to be applied in the enforcement of a government promise not to prosecute poses an important problem that should be decided by the United States Supreme Court. Are prejudice and a constitutional violation required to be shown by a defendant who seeks to enforce a pre-

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4 In fact, the magistrate in the instant case applied *Morrison* because he erroneously believed it applied to "pretrial" government misconduct. p. A-35.

indictment promise by a government agent not to prosecute, or should that promise be enforced if the defendant cooperates and waives his self-incrimination privilege under the Fifth Amendment? Must a defendant show "actual authority" of an agent to make a promise? Some defendants who are being promised dismissal are having those promises enforced by the courts when they are charged; other defendants are not having those promises enforced unless they are able to show some prejudicial use of the statement (other than the prejudice of the charge being filed) and unless they are able to show that the agent had the actual authority to make the promise. The divergent standards result in two types of justice being meted out to defendants in criminal prosecutions, and the conflict should be resolved by this Court.

CONCLUSION

This case presents the opportunity for this Court to resolve the conflict in the circuits as to when the courts should enforce a government agent's promise that a defendant will not be charged in return for cooperation where the defendant cooperates and the promise is violated, and provides an opportunity for this court to decide whether it is a proper exercise of the supervisory powers of the federal courts to dismiss an indictment to enforce such a promise.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: May 4, 1993

APPENDIX TO PETITION FOR CERTIORARI

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DECISION SOUGHT TO BE REVIEWED: **OPINION**

RECOMMENDED FOR FULL-TEXT PUBLICATION
-Pursuant to Sixth Circuit Rule 24-

(United States Court of Appeals – Sixth Circuit)

(Decided and Filed March 2, 1993)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN C. STREEBING, Defendant-Appellant – No. 92-1154; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: KENNEDY and GUY, Circuit Judges;
and BROWN, Senior Circuit Judge.

KENNEDY, Circuit Judge.

Defendant Steven C. Streebing appeals his jury conviction and sentence for mail fraud and for making false and material statements and representations on applications he submitted to the Social Security Administration for disability insurance benefits. The following issues are raised on appeal: (1) whether the District Court erred in failing to utilize its supervisory powers to dismiss the indictment in light of the government's alleged promise not to indict the defendant if he cooperated; and (2) whether the District Court erred in imposing restitution based on the entire mail fraud scheme in the absence of a finding of guilty for each of the mailings pursuant to that scheme. For the reasons set forth below, the defendant's convictions are affirmed, the restitution component of the sentence is vacated in part, and this case remanded for resentencing.

I.

On October 8, 1985, defendant, an employee of General Dynamics Land Systems ("General Dynamics"), was temporarily reassigned from his engineering position to the production area of the plant. Citing fears evoked by reason of a previous injury, defendant told the occupational health nurse that he did not want to work in tool and die. Defendant was sent home that same day when he said he was sick. Claiming total disability due to depression and other psychological problems caused by the job reassignment, defendant applied for, and began receiving, sickness and accident benefits (SAB) from General Dynamics.[1] From November 1985 to April 1986, defendant received approximately $7,439.90 in sickness and accident benefits from Aetna Insurance Company, General Dynamic's insurance carrier. Defendant also applied for and began receiving long-term disability (LTD). From April 1986 to January 1989, defendant received approximately $43,261.54 in long-term disability benefits from Aetna.

In May of 1986, defendant applied for social security disability benefits and filled out a social security disability report. The application for disability asked the applicant to enter the names and addresses of all persons, companies, and agencies for whom the applicant had worked "This year, last year, and the year before."

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[1] **Regarding its sickness and accident benefits and long term disability benefits, General Dynamic's group insurance booklet explained that:**

> **During the first 18 months of disability, you are considered totally disabled if you cannot do your normal job because of illness or injury. After that period, you are considered totally disabled if you cannot work for pay or profit at any job for which you are, or could reasonably become, fitted by education, training or experience. You must be under the care of a physician at all times and not be working for pay or profit.**

Defendant's answer was "General Dynamics." The application also asked whether the applicant was "self-employed this year, last year, or the year before." Defendant responded "no." Defendant's application was denied, and on October 23, 1987, defendant made out another application for social security benefits and an accompanying disability report. His answers to the questions pertaining to his employment activity were the same as on the first application. Again defendant's request was denied. After filling out another application in December of 1987, defendant was finally awarded social security benefits. Between December of 1987 and August of 1989, defendant received social security benefits totalling $ 14,115.00

The evidence adduced at trial showed that shortly after defendant began receiving sickness and accident benefits from Aetna, he formed a corporation, Valhala Music, to create and market computer software for the music industry. Defendant was president of the corporation and owned 51% of its stock. During the entire time that defendant was receiving long-term disability and social security benefits, he was actively involved in the operations of Valhala, including creating, advertising, and marketing the software. The corporation was operated out of defendant's home for which Valhala paid a substantial portion of the upkeep and expenses.[2]

On April 26, 1991, defendant was charged with nine counts of mail fraud and three counts of making false statements in connection with an alleged scheme to defraud the Social Security Administration and Aetna Life Insurance Company of disability benefits. On August 24, 1989, about a year and eight months before this indictment was returned, defendant was interviewed at

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[2] **The indictment indicates that defendant did not draw a salary from the corporation.**

his home by an agent from the Federal Bureau of Investigation, an investigator for the Department of Health and Human Services, and an investigator for General Dynamics. This interview was conducted as part of the investigation into what appeared to be defendant's falsification of his status as totally disabled. The first hour and one half of the interview was videotaped by defendant.

The recording establishes that during the interview, defendant made inculpatory statements and admissions with respect to activities charged in the indictment. Prior to trial, defendant filed a motion to dismiss the indictment alleging that the FBI agent told defendant "both directly and impliedly that if he cooperated and made a statement and told the agent what he wanted to hear, there would be no prosecution and there would [be] no indictment." The District Court denied the motion.

At trial, defendant was acquitted on Counts 1, 3, 4 and 5, and was found guilty on four mail fraud counts (8, 9, 11 and 12) and on three counts of making false statements to the Social Security Administration (2, 6, and 7).[3] On January 24, 1992, defendant was sentenced to concurrent terms of five (5) months imprisonment on each count, three (3) years supervised release, and was ordered to make restitution to Aetna and the Social Security Administration in the amount of $64,816.44. This timely appeal followed.

II.
DISMISSAL OF THE INDICTMENT

Defendant first argues that the District Court erred in failing to dismiss the indictment. Defendant contends

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[3] **The government dismissed Count 10 during trial.**

that during the course of the August 24, 1989 interview, a special agent of the FBI promised the defendant he would not be prosecuted if he cooperated in making a statement. During the course of the taped portion of the interview between defendant and the investigators, the following exchange took place:

> JAY SIEGER (FBI): Ok, then, if you want to resolve it, when this man [referring to John Pollock of HHS] asks you why you put none [referring to Streebing's answer to a question about his earnings or self-employment income on his social security application forms], then you gotta tell him — I put none because I knew if I would have put something down there I wouldn't have got the benefits. That's what you gotta tell him
>
> JOHN POLLOCK (HHS): And not.
>
> STREEBING: And then it won't go to court? And then
>
> POLLOCK: No, let me put, let me put
>
> STREEBING: I just reimburse you guys, or whatever? or ah
>
> POLLOCK: Steve, your [*sic*] gonna reimburse us, ok
>
> STREEBING: Can I, but will I be able to do it without going to court? or will
>
> POLLOCK: I don't now that, I'm not a jury. All I am is an investigator.
>
> SIEGER: *You're not gonna be indicted, you're not going to be indicted. Ok, if we go back to the United States Attorney's office and we tell him, here's what we did, we went out and talked to this guy, he acknowledged what he did, he acknowledged violating federal law, ok, now Mr.*

> *Prosecutor, do you want to prosecute this man or not, that's gonna be his decision.* If I go to him, after I, if you let me walk out of here today, and I go out and prove what I know we can prove, I'll guarantee you what will happen when we walk out with him. *You're gonna be prosecuted one way or another*, Steve, you're gonna have to face that, ok. You're either gonna be, we're either gonna go and ask for an indictment against you, or you're gonna come down and resolve it prior to that time. By your telling us what you're telling me today, and John today, is that you don't want to resolve it at this time. You'd rather wait until after charges are brought against you and then resolve it.

(Emphasis added). Defendant maintains that because he cooperated, the government was obligated to fulfill its part of the bargain and because it did not, the District Court should have dismissed the indictment.

The power of a district court to dismiss a grand jury indictment under the supervisory powers doctrine is premised on the inherent ability of the federal courts to formulate procedural rules not specifically required by the Constitution or Congress to supervise the administration of justice. *See United States* v. *Isgro*, 974 F.2d 1091, 1094 (9th Cir. 1992); *United States* v. *Talbot*, 825 F.2d 991, 998 (6th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1990) (the courts retain inherent supervisory authority over the law enforcement processes which culminates in the criminal proceedings brought before them). In order to invoke this power, a court must first find that the defendant is actually prejudiced by the misconduct. *Id.* In accepting the magistrate judge's report and recommendation that the indictment in this case should not be dismissed, the District Court stated:

> As [the] Magistrate . . . correctly noted in his Report and Recommendation, the court should not dismiss an indictment absent a showing that defendant "was demonstrably prejudiced by the violation." *United States* v. *Talbot*, 825 F.2d 991, 998 (6th Cir. 1987). Even assuming the FBI agent told defendant he would not be prosecuted if he cooperated (an assertion which the government strongly contests) dismissal of the indictment is a drastic remedy, which is appropriate only in truly egregious cases. *See United States* v. *Morrison*, 449 U.S. 361 (1980). Defendant has failed to show any such prejudice in this case.

The District Court based its decision that there was no prejudice on the government's stipulation that none of the statements made by defendant at the interview with the agents would be used at trial, as well as the Assistant United States Attorney's representation to the District Court that none of these statements were presented to the grand jury. We agree with the District Court that the indictment should not be dismissed for prosecutorial misconduct. The defendant was not prejudiced.

Defendant also argues for dismissal of the indictment based upon the government's alleged breach of promise not to prosecute. In *Santobello* v. *New York*, 404 U.S. 257 (1971), the Supreme Court held that when the government makes promises to a defendant who relies on those promises and pleads guilty, the government must carry out its representations. Because defendant did not plead guilty, the facts here are not governed by *Santobello*. However, a cooperation agreement is analogous to a plea bargain agreement. *United States* v. *Carrillo*, 709 F.2d 35, 36 (9th Cir. 1983). Consequently, several courts have acknowledged that the principles of

Santobello apply whenever a defendant acts to his detriment in reliance upon governmental promises. *See, e.g., Carrillo*, 709 F.2d 35 (upholding dismissal of the indictment when DEA agents breached promise not to prosecute if defendant cooperated with government's investigation of suspected drug traffickers); *United States* v. *Rodman*, 519 F.2d 1058 (1st Cir. 1975) (requiring dismissal of an indictment when SEC breached agreement to make no prosecution recommendation to United States Attorney in return for defendant's cooperation).[4]

The relevant case law also makes clear, however, that while "[a]s a general rule, fundamental fairness requires that promises made during plea-bargaining and analogous contexts be respected," *Johnson* v. *Lumpkin*, 769 F.2d 630, 633 (9th Cir. 1985), this rule is subject to two conditions: (1) the agent must be authorized to make the promise; and (2) the defendant must rely to his detriment on the promise. *Id. See also United States* v. *Kettering*, 861 F.2d 675 (11th Cir. 1988). Even assuming, *arguendo*, that the exchange between defendant and FBI agent Sieger constituted a promise not to prosecute defendant if he cooperated, defendant has failed to satisfy either requirement of this test.

First, the record is devoid of any evidence establishing that FBI agent Sieger was authorized to make

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[4] **In *Rodman*, the SEC promised to recommend that the United States Attorney's office not prosecute Rodman if he would cooperate with an SEC investigation. Although Rodman provided substantial information, including self-incriminating statements, in reliance on the agreement, the SEC failed to make the promised recommendation. Not only did the official fail to make such a recommendation, but at the time of the statements he was actively contemplating the preparation of a criminal reference report which would have included the defendant. The Court of Appeals held the district court did not abuse its supervisory powers by dismissing the indictment for unfairness.**

promises or representations to induce defendant's cooperation. Moreover, during the course of the interview, the agent stated that defendant "was gonna be prosecuted one way or another" and that the final decision on the manner of defendant's prosecution rested with the United States Attorney's office. At no time did the United States Attorney ever offer defendant immunity from prosecution.[5] Therefore, because the FBI agent lacked any actual or apparent authority to make the alleged promise not to prosecute, the District Court did not err in failing to dismiss the indictment. *See Kettering*, 861 F.2d at 678 (DEA agent never authorized by the Assistant United States Attorney to enter plea agreement with defendant and thus plea agreement unenforceable); *Lumpkin*, 769 F.2d at 634 (court held that a promise by federal agents that defendant would serve no time on state charges if he cooperated in the federal investigation was unauthorized); *United States* v. *Hudson*, 609 F.2d 1326, 1329 (9th Cir. 1979) (court held that fundamental fairness concerns did not require the United States Attorney to abide by a secret service agent's promise to a defendant to drop federal counterfeit charges in eschange for defendant's cooperation in the case where the United States Attorney never sanctioned the agreement and promise clearly outside the agent's authority).

Second, defendant did not rely to his detriment upon the alleged promise not to prosecute. It is undisputed that the government did not use any of the information obtained from defendant during the interview against him in any subsequent proceeding nor did it present the information to the grand jury. Consequently, defend-

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[5] **In fact, the government points out the absurdity of their promising to let a defendant go free of any punishment for a crime he commits merely because he admits his guilt.**

ant was in no worse a position at the time of trial than he was at any time prior to or after the interview, and as such, he suffered neither prejudice nor detrimental reliance. Accordingly, he is not entitled to specific performance of the alleged cooperation agreement.

In *United States* v. *Williams*, 780 F.2d 802, 803 (9th Cir. 1986), the Ninth Circuit stated that:

> In general, a promise made by a government employee other than the United States Attorney to recommend dismissal of an indictment cannot bind the United States Attorney. An exception has been recognized where, although the United States Attorney was not a party to a cooperation agreement, breach of the agreement rendered a prosecution fundamentally unfair.

(citation omitted). Promises by federal agents that a defendant will not be indicted are analogous to promises to recommend dismissal of an indictment. Thus, because the prosecution in the case at hand was not fundamentally unfair, the District Court did not err in failing to impose the drastic remedy of dismissal of the indictment.

III.
RESTITUTION

In pertinent part, the Victim and Witness Protection Act ("VWPA") provides:

> The court, when sentencing a defendant convicted of an offense under this title . . . may order, in addition to or . . . in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

18 U.S.C. § 3663(a)(1) (1988). Defendant argues that the amount of restitution ordered by the District Court,

$64,816.44,[6] was impermissible under the terms of the VWPA and in light of the Supreme Court's interpretation of the Act in *Hughey* v. *United States*, 495 U.S. 411 (1990) as well as this Court's recent decision in *United States* v. *Jewett*, 978 F.2d 248 (6th Cir. 1992). In *Hughey*, defendant was charged with three counts of theft by a postal service employee and three counts of unauthorized use of credit cards. Hughey pled guilty to one count of unauthorized use of a single credit card. Count 4 alleged that "on or about October 18, 1985, . . . [Hughey] did knowingly and with intent to defraud use an unauthorized [MBank Mastercard credit card] issued to Hershey Godfrey . . . ." *Hughey*, 495 at 413-14. Hughey was ordered to pay restitution of $90,431, the total of MBank's losses relating to Hughey's alleged theft and use of 21 credit cards issued by MBank to various cardholders, even though MBank lost only $10,412 as the result of Hughey's unauthorized use of the Godfrey credit card. At issue was whether the VWPA "allow[s] a court to order a defendant who is charged with multiple offenses but who is convicted of only one offense to make restitution for losses related to the other alleged offenses." *Id.* at 412-13. The Court held that the Act

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6 This figure represents the total amount of all Aetna SAB, Aetna LTD and SSA benefits paid to defendant from November 1986 to September 1989. The district judge, however, used a different amount for sentencing purposes. He used the $39,296.42 amount, representing the total amount of Aetna LTD benefits ($25,181.42) and SSA benefits ($14,115.00) paid to defendant between April 1987 and January 1989. This amount excludes benefits defendant received from Aetna prior to March 1987. Defendant was acquitted on all mail fraud counts involving checks paid by Aetna to defendant prior to March 1987. These acquittals were indicative of a finding by the jury that defendant may have met the requirements for disability benefits during the first 18 months following his separation from the company in October of 1985. The sentencing court, however, found that the evidence demonstrated by at least a preponderance that defendant was engaged in a scheme to defraud Aetna from as early as the beginning of his disability, and thus used the full $64,816.44 figure for restitution purposes.

"authorize[s] an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Id.* at 413.

A. False Statements

It is undisputed that non-human entities such as the Social Security Administration can be "victims" entitled to restitution under section 3663. *See, e.g., United States* v. *Durham*, 755 F.2d 511 (6th Cir. 1985). Defendant was indicted on three counts of knowingly and willfully making false statements of material facts,

> that is, STREEBING stated and represented in an application to the Social Security Administration for disability insurance benefits that he had been unable to work since October 7, 1985 because of severe depression, that he had last worked for General Dynamics, and that he was not self-employed, whereas in truth STREEBING was the president of and was running his own company, Valhala Music, Inc.; all in violation of Title 18, United States Code, Section 1001.[7]

Defendant was found guilty on all three counts of making false statements. Accordingly, because the VWPA allows restitution for the "loss caused by the specific conduct that is the basis of the offense of conviction," *Hughey*, 495 U.S. at 413, the Social Security Administration is entitled to the full $ 14,115.00 that it paid to defendant between April 1987 and January 1989. These payments were all issued as a result of defendant's false statements on his application for disability.

B. Mail Fraud

This Court has addressed the application of *Hughey* in a case involving convictions for mail fraud in *United*

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[7] **Defendant filled out three applications for benefits and these applications formed the basis of the three counts.**

States v. *Jewett*, 978 F.2d 248 (6th Cir. 1992). Both parties concede that the decision in *Jewett* is dispositive and binding on this Court. Jewett was employed as a consultant to Arc Rubber, Inc. In a nine-count mail fraud indictment, the government alleged that Jewett and the president of Arc Rubber secured Ford business through kickbacks paid to a Ford employee, Schafer, who "steered Ford business to Arc Rubber." Between February 1984 and March 1989, Arc Rubber issued checks for approximately $650,000 to Interglobal Consultants, a business name assumed by Schafer to receive kickbacks.

Jewett pled guilty to Counts I and II of the indictment in exchange for the government dismissing all other counts. Count I set forth fully Jewett's fraudulent scheme and referred specifically to a $44,924 check Jewett caused to be mailed for the purpose of executing his scheme. Count II incorporated by reference the description of the scheme and referred specifically to another check in the amount of $24,054.60 mailed to Ford by Arc Rubber. The sentencing court, pursuant to the VWPA, ordered Jewett to pay $665,978.60, while Jewett argued that restitution should have been limited to $68,978.60, the amount of the two checks specified in the two counts to which he pled guilty. Similarly, in the case at issue, the sentencing court ordered defendant to pay the full amount received from Aetna. Defendant contends that he should only have to pay restitution in the amount of the check from Aetna specified in Count 8 to which he was found guilty.[8]

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[8] **Count 8 refers to an Aetna draft dated March 31, 1988 (and mailed to defendant) in the amount of $915.61. Counts 9, 11, and 12 pertain to social security disability benefits dated April 21, 1988, in the amount of $2,644.00; March 3, 1989, in the amount of $687.00; and September 1, 1989, in the amount of $687.00, respectively. Recovery for the latter three checks is subsumed within the $14,115.00 restitution award for the false statement convictions.**

In *Jewett*, as in this case, the government urged the court to adopt the position taken by the Seventh Circuit. Namely, that "[p]roof of a scheme is an element of the offense of mail fraud, and therefore, actions pursuant to that scheme should be considered 'conduct that is the basis of the offense of conviction.'" *United States* v. *Bennett*, 943 F.2d 738, 740 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2970 (1992). In rejecting this argument, this Court stated that:

> [T]he fact that an offense requires, as an essential element, the existence of a scheme to defraud "is too fine a point on which to distinguish *Hughey* . . . ." In this case, we believe the "specific conduct that is the basis of the offense of conviction," *Hughey*, 495 U.S. at 413, 110 S. Ct. at 1981, can only reasonably refer to the two mailings which serve as the bases for Jewett's convictions, and that the losses attributable to the particular mailings specified in Count I and II "establish[] the outer limits of [the] restitution order." *Id.* at 420.
>
> . . . The offense of mail fraud describes the use of the mails for the purpose of executing a scheme to defraud, and it is that specific conduct, and the losses caused by it, that establishes the scope of the district court's authority in ordering restitution under the VWPA. *Acts other than the particular mailing described in a count of conviction, even when committed during the course of or in furtherance of the same fraudulent scheme, do not state independent "offenses of conviction."* A restitution order encompassing losses attributable to these acts is, therefore, beyond the scope of a sentencing court's authority to order restitution to "any victim of [an] offense." 18 U.S.C. § 3663(a)(1).

> The "specific conduct" for which defendant Jewett was convicted was mail fraud, not executing a fraudulent scheme. The existence of a scheme to defraud Ford of over $650,000 does not, and cannot, alter the statutory command that restitution under the VWPA be limited to "victim[s] of [the] offense" of conviction. In this case, the offenses of conviction were the two uses of the mail in the execution of a scheme to defraud Ford. The district court, in ordering restitution based on all losses caused by defendant Jewett's scheme to defraud rather than those attributable to the specific mailings for which Jewett was charged and convicted in Counts I and II, exceeded its statutory authority under 18 U.S.C. § 3663(a)(1).

Jewett, 978 F.2d at 251-52 (citations omitted; emphasis added). Applying *Jewett*, the offense of conviction was the one use of the mail, set forth in Count 8, in the execution of defendant's scheme to defraud Aetna. Consequently, the District Court should have ordered defendant to pay Aetna only the $915.61 charged in Count 8.

The amendments to the VWPA, which became effective November 29, 1990, do not alter this decision. In pertinent part, the VWPA now provides:

> For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern or criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

18 U.S.C. § 3663(a)(2). While "[t]his amended subsection expands the definition of a 'victim' in cases such as mail fraud, and, if applicable, would appear to authorize

restitution in this case for all losses attributable to [Streebing's] scheme to defraud [Aetna]," *Jewett*, 978 F.2d at 252, retroactive application of this provision in this case would violate the constitutional prohibition of *ex post facto* laws. *Id.*

This Court has already interpreted the amended section 3663(a)(2) as "a change in law, superseding the Supreme Court's decision in *Hughey*, adopting a broader definition of 'victim,' and expanding the scope of restitution which may be ordered for offenses involving 'as an element a scheme, a conspiracy, or a pattern of criminal activity. . . .'" *Id.* at 253. Because the amended 18 U.S.C. § 3663(a)(2) took effect after defendant committed the mail fraud offenses for which he was convicted, and increased the applicable penalties for those crimes, it constitutes an *ex post facto* law as applied to the facts of this case. *Id.* Retroactive application of this specific provision is thus constitutionally prohibited and although it was in effect at the time of defendant's conviction (November 11, 1991) and sentencing (January 24, 1992), it cannot be legally enforced against him for acts committed prior to November 29, 1990. *Id.* Consequently, under this Court's holding in *Jewett*, restitution to Aetna is limited to the loss caused by the mailing for which defendant was convicted, *i.e.*, the $915.61 listed in Count 8.

IV.

For the aforementioned reasons, defendant's convictions are AFFIRMED, the restitution component of the sentence is VACATED in part, and this case REMANDED for resentencing in accordance with this opinion.

CORRECTED JUDGMENT
(Page 3 ONLY)

(United States District Court —
Eastern District of Michigan)

(Dated January 24, 1992)

(UNITED STATES OF AMERICA v. STEVEN C. STEEBING, (Name of Defendant); Case Number: 91-CR-80361-01-DT; *HONORABLE BERNARD A. FRIEDMAN*)
Defendant's Attorney: *EDWARD C. WISHNOW P22472*

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:
☒ was found guilty on count(s) *8, 9, 11 and 12* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:
Title & Section: *18:1341*
Nature of Offense: *MAIL FRAUD*
Date Offense Concluded: *MAY 10, 1991*
Count Number(s): *8, 9, 11 and 12*
FOR JUDGMENT ON COUNTS 2, 6 and 7 —
SEE ATTACHED NON-GUIDELINE JUDGMENT

The defendant is sentenced as provided in pages 2 through *6* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) *1, 3, 4 and 5* and is discharged as to such count(s).

☒ Count *10* is dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of *$50.00* for count(s) *8, 9, 11 & 12 (TOTAL $200)*, which shall be due: ☒ *immediately*.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: *367-60-0846*
Defendant's Date of Birth: *March 9, 1955*
Defendant's Residence Address: *205 East Hazelhurst*
Ferndale, Michigan 48220

Date of Imposition of Sentence: *JANUARY 24, 1992*

Signature of Judicial Officer: */s/ Bernard A. Friedman*
Name and Title of Judicial Officer: *BERNARD A. FRIEDMAN*
UNITED STATES DISTRICT JUDGE

Date: *MARCH 4, 1992*

Judgment–Page *2* of *5* [*sic*, of *6*]

Defendant: *STEVEN C. STREEBING*
Case Number: *91-CR-80361-01-DT*

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *Five (5) months on each count 8, 9, 11 and 12 to run concurrent to each other and to the sentence imposed on Counts 2, 6 and 7 (Non-Guideline—attached)*

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
☒ before 2 p.m. on *February 14, 1992*

Judgment–Page *3* of *6*

Defendant: *STEVEN C. STREEBING*
Case Number: *91-CR-80361-01-DT*

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *Three (3)*

years on each of counts 8, 9, 11 and 12, to be served concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☒ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) Defendant is to abide by all standard conditions of Supervised Release.

15) Defendant is to serve the first five (5) months of supervised release at the Community Treatment Center.

16) Defendant is to pay any restitution as directed by the Probation Department.

17) Defendant is prohibited from incurring new credit charges or opening new or additional lines of credit without first obtaining approval of Probation Officer.

18) Defendant is to provide the probation officer with access to any requested financial information.

19) Defendant is to serve 250 hours of community service in his area of expertise as directed by Probation Officer.

FINE

No fines or other costs will be ordered due to the defendant's inability to pay.

Defendant: *STEVEN C. STREEBING* Judgment–Page *5* of *6*
Case Number: *91-CR-80361-01-DT*

RESTITUTION AND FORFEITURE

☒ The defendant shall make restitution to the following persons in the following amounts: *Restitution is ordered in the total amount of $64,816.44 under 18:USC: 3663-3664 to Aetna and the Social Security Administration, in the individual amounts as directed by U.S. Probation. Such restitution is due immediately and payable to the Department of Justice for transfer to the victims.*

Defendant: *STEVEN C. STREEBING* Judgment–Page *6* of *6*
Case Number: *91-CR-80361-01-DT*

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court: Total Offense Level: *12*; Criminal History Category: *1*; Imprisonment Range: *10* to *16* months; Supervised Release Range: *2* to *3* years; Fine Range: *$3,000.00* to *$30,000.00*

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: *$64,816.44*

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

JUDGMENT AND PROBATION/COMMITMENT ORDER

(United States District Court —
Eastern District of Michigan, Southern Division)

DEFENDANT: *STEVEN C. STREEBING, 205 East Hazelhurst, Ferndale, Michigan 48220 91-CR-80361-01-DT*

COUNSEL: ☒ WITH COUNSEL: *EDWARD C. WISHNOW P22472*

FINDING & JUDGMENT: There being a finding, verdict of:

☒ GUILTY Defendant has been convicted as charged of

the offense(s) of: *COUNTS 2, 6 and 7: 18:1001 FALSE STATEMENTS as charged in the INDICTMENT*

FOR SENTENCE IMPOSED ON COUNTS 8, 9, 11 and 12 — SEE GUIDELINE JUDGMENT ATTACHED.

SENTENCE OR PROBATION ORDER:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of: *Five (5) months on each count 2, 6 and 7 to run concurrent to each other and to the sentence imposed on Counts 8, 9, 11 and 12 of Guideline Judgment (attached).*

Defendant is ordered to pay a Special Assessment Fee of $50.00 on each count for a total of $150.00

ADDITIONAL CONDITIONS OF PROBATION/ COMMITMENT RECOMMENDATION:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends *that defendant's be served at the Community Treatment Center.*

SIGNED BY: *BERNARD A. FRIEDMAN* ☒ *U.S. District Judge*
DATE: *FEB. 14, 1992*

(*Certification Omitted*)

INDICTMENT

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed April 26, 1991)

(UNITED STATES OF AMERICA, Plaintiff, vs. STEVEN C. STREEBING, Defendant – CRIMINAL NO. 9180361; VIO.: 18 U.S.C. §§ 1001, 1341; HON. BERNARD A. FRIEDMAN)

THE GRAND JURY CHARGES:

COUNT ONE
(18 U.S.C. § 1341–MAIL FRAUD)

I. That between on or about October 8, 1985 and on or about August 24, 1989, defendant STEVEN C. STREEBING (hereinafter STREEBING), devised and intended to devise a scheme to defraud the United States Social Security Administration (SSA) and Aetna Life Insurance Company (Aetna), and to obtain money from SSA and Aetna by means of false and fraudulent pretenses and representations.

II. That the scheme and the false and fraudulent pretenses and representations are described essentially as follows:

STREEBING became an employee of General Dynamics Land Systems in 1982. On October 8, 1985, General Dynamics was experiencing a UAW strike. As a result, STREEBING, who had been working as a Logistics Analyst at the Warren Logistics Center, was temporarily reassigned to the Production Department of the Detroit. Arsenal Tank Plant. Upon being reassigned, STREEBING stated that he would not do any assembly work which would "kill people." A short time later, STREEBING claimed that he was sick and wanted to go home.

STREEBING was sent to the Medical Department and received a pass to go home.

STREEBING then began seeing Dr. Marvin Sherman, a Psychiatrist who was "treating" STREEBING's roommate, Dwight Neely. STREEBING told Sherman that his reassignment to the Tank Plant had evoked terrifying memories of a severe cut he had received twelve years earlier in an industrial accident, and of an incident where a neighboring worker's hands were amputated in an industrial accident.

On or about October 19, 1985, STREEBING filed an application with Aetna, the group insurer of General Dynamics employees, for sickness and accident benefits. Based on Sherman's certification that STREEBING was "totally disabled," STREEBING began receiving sickness and accident benefits from Aetna. On or about February 27, 1986, STREEBING filed an application with Aetna for long-term disability benefits based upon his alleged depression. Sherman again certified that STREEBING was "totally disabled," and STREEBING began receiving long-term disability benefits.

On or about May 27, 1986, STREEBING applied to SSA for disability benefits based on his alleged depression. Although benefits were initially denied, STREEBING reapplied and eventually began receiving SSA benefits.

From November 1985 to April 1986, STREEBING received a total of approximately $7,439.90 of sickness and accident benefits from Aetna. From April 1986 to January 1989, STREEBING received approximately $43,261.54 of long-term disability benefits from Aetna. From December 1987 to September 1989, STREEBING received approximately $14,115.00 of SSA benefits.

At various times in the course of qualifying for and maintaining eligibility for the benefits he received,

STREEBING stated and represented to Aetna and SSA, in essence, that he had not worked since October, 1985, that he was unable to work, that he was not self-employed, that he was not presently earning any money, that he was unable to concentrate, and that he was minimally functional.

STREEBING's statements and representations were false, however. In approximately October, 1985 he formed Valhala Music. On or about January 17, 1986, STREEBING incorporated Valhala Music, Inc. STREEBING was president of the corporation and owned 51% of its stock. Dwight Neely owned the other 49%. Valhala created and sold, via mail and telephone order, synthesized sound and sound effect ROMS (read-only memory computer chips) and other computer software used by the music industry. STREEBING operated Valhala out of his home. By 1989, Valhala was reporting gross sales of $459,339.00. Although STREEBING did not draw a salary, he collected rent from Valhala for the corporation's use of his home and the corporation paid a substantial portion of STREEBING's expenses.

III. That on or about April 28, 1986, in the Eastern District of Michigan, Southern Division, defendant STEVEN C. STREEBING knowingly caused to be delivered by mail, according to the direction thereon, an envelope which was addressed to STREEBING at 205 East Hazelhurst, Ferndale, Michigan and which contained an Aetna draft dated April 25, 1986 and payable to STREEBING in the amount of $638.79; all in violation of Title 18, United States Code, Section 1341.

COUNT TWO

(18 U.S.C. §1001–FALSE STATEMENTS)

That on or about May 27, 1986, in the Eastern District of Michigan, Southern Division, defendant STEVEN C.

STREEBING, in a matter within the jurisdiction of the United States Department of Health and Human Services, knowingly and willfully made a false statement of material facts, that is, STREEBING stated and represented on an application to the Social Security Administration for disability insurance benefits that he had been unable to work since October 7, 1985 because of depression, that he had last worked for General Dynamics, and that he was not self-employed, whereas in truth STREEBING was the president of and was running his own company, Valhala Music, Inc.; all in violation of Title 18, United States Code, Section 1001.

COUNT THREE

(18 U.S.C. § 1341–MAIL FRAUD)

I. That the allegations contained in paragraphs I and II of Count One are realleged herein.

II. That on or about June 3, 1986, in the Eastern District of Michigan, Southern Division, defendant STEVEN C. STREEBING knowingly caused to be delivered by mail, according to the direction thereon, an envelope which was addressed to STREEBING at 205 East Hazelhurst, Ferndale, Michigan and which contained an Aetna draft dated May 31, 1986 and payable to STREEBING in the amount of $833.77; all in violation of Title 18, United States Code, Section 1341.

COUNT FOUR

(18 U.S.C. § 1341–MAIL FRAUD)

I. That the allegations contained in paragraphs I and II of Count One are realleged herein.

II. That on or about September 15, 1986, in the Eastern District of Michigan, Southern Division, defendant STEVEN C. STREEBING knowingly caused to be delivered by mail, according to the direction thereon, an

envelope which was addressed to STREEBING at 205 East Hazelhurst, Ferndale, Michigan and which contained an Aetna draft dated September 12, 1986 and payable to STREEBING in the amount of $2,727.00; all in violation of Title 18, United States Code, Section 1341.

COUNT FIVE
(18 U.S.C. § 1341–MAIL FRAUD)

I. That the allegations contained in paragraphs I and II of Count One are realleged herein.

II. That on or about January 3, 1987, in the Eastern District of Michigan, Southern Division, defendant STEVEN C. STREEBING knowingly caused to be delivered by mail, according to the direction thereon, an envelope which was addressed to STREEBING at 205 East Hazelhurst, Ferndale, Michigan and which contained an Aetna draft dated December 31, 1986 and payable to STREEBING in the amount of $915.61; all in violation of Title 18, United States Code, Section 1341.

COUNT SIX
(18 U.S.C. § 1001–FALSE STATEMENTS)

That on or about April 23, 1987, in the Eastern District of Michigan, Southern Division, defendant STEVEN C. STREEBING in a matter within the Jurisdiction of the United States Department of Health and Human Services, knowingly and willfully made a false statement of material facts, that is, STREEBING stated and represented in an application to the Social Security Administration for disability insurance benefits that he had been unable to work since October 7, 1985 because of depression and headaches, that he had last worked for General Dynamics, and that he was not self-employed, whereas in truth STREEBING was the president of and was running his own company, Valhala Music, Inc.; all in violation of Title 18, United States Code, Section 1001.

COUNT SEVEN
(18 U.S.C. § 1001–FALSE STATEMENTS)

That on or about October 27, 1987, in the Eastern District of Michigan, Southern Division, defendant STEVEN C. STREEBING, in a matter within the jurisdiction of the United States Department of Health and Human Services, knowingly and willfully made a false statement of material facts, that is, STREEBING stated and represented in an application to the Social Security Administration for disability insurance benefits that he had been unable to work since October 7, 1985 because of severe depression, that he had last worked for General Dynamics, and that he was not selfemployed, whereas in truth STREEBING was the president of and was running his own company, Valhala Music, Inc.; all in violation of Title 18, United States Code, Section 1001.

COUNT EIGHT
(18 U.S.C. § 1341–MAIL FRAUD)

I. That the allegations contained in paragraphs I and II of Count One are realleged herein.

II. That on or about April 3, 1988, in the Eastern District of Michigan, Southern Division, defendant STEVEN C. STREEBING knowingly caused to be delivered by mail, according to the direction thereon, an envelope which was addressed to STREEBING at 205 East Hazelhurst, Ferndale, Michigan and which contained an Aetna draft dated March 31, 1988 and payable to STREEBING in the amount of $915.61; all in violation of Title 18, United States Code, Section 1341.

COUNT NINE
(18 U.S.C. § 1341–MAIL FRAUD)

I. That the allegations contained in paragraphs I and II of Count One are realleged herein.

II. That on or about April 23, 1988, in the Eastern District of Michigan, Southern Division, defendant STEVEN C. STREEBING knowingly caused to be delivered by mail, according to the direction thereon, an envelope which was addressed to STREEBING at 205 East Hazelhurst, Ferndale, Michigan and which contained a United States Treasury check dated April 21, 1988 and payable to STREEBING in the amount of $2,644.00; all in violation of Title 18, United States Code, Section 1341.

COUNT TEN
(18 U.S.C. §1341–MAIL FRAUD)

I. That the allegations contained in paragraphs I and II of Count One are realleged herein.

II. That on or about February 3, 1989, in the Eastern District of Michigan, Southern Division, defendant STEVEN C. STREEBING knowingly caused to be delivered by mail, according to the direction thereon, an envelope which was addressed to STREEBING at 205 East Hazelhurst, Ferndale, Michigan and which contained an Aetna draft dated January 31, 1989 and payable to STREEBING in the amount of $915.61; all in violation of Title 18, United States Code, Section 1341.

COUNT ELEVEN
(18 U.S.C. §1341–MAIL FRAUD)

I. That the allegations contained in paragraphs I and II of Count One are realleged herein.

II. That on or about March 5, 1989, in the Eastern District of Michigan, Southern Division, defendant STEVEN C. STREEBING knowingly caused to be delivered by mail, according to the direction thereon, an envelope which was addressed to STREEBING at 205 East Hazelhurst, Ferndale, Michigan and which contained a United States Treasury check dated March 3, 1989 and payable to

STREEBING in the amount of $687.00; all in violation of Title 18, United States Code, Section 1341.

COUNT TWELVE
(18 U.S.C. §1341–MAIL FRAUD)

I. That the allegations contained in paragraphs I and II of Count one are realleged herein.

II. That on or about September 3, 1989, in the Eastern District of Michigan, Southern Division, defendant STEVEN C. STREEBING knowingly caused to be delivered by mail, according to the direction thereon, an envelope which was addressed to STREEBING at 205 East Hazelhurst, Ferndale, Michigan and which contained a United States Treasury check dated September 1, 1989 and payable to STREEBING in the amount of $687.00; all in violation of Title 18, United States Code, Section 1341.

THIS IS A TRUE BILL

/s/ [*Illegible*]
Foreperson

STEPHEN J. MARKMAN
United States Attorney

/s/ STEPHEN T. ROBINSON (P28030)
Assistant United States Attorney

/s/ BLONDELL L. MOREY (P23396)
Chief, Economic Crime Unit
Assistant United States Attorney

Dated: *4-26-91*

MOTION FOR EVIDENTIARY HEARING AND TO DISMISS INDICTMENT WITH PREJUDICE

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated June 13, 1991)

(UNITED STATES OF AMERICA, Plaintiff, -v- STEVEN C. STREEBING, Defendant – Case No. 91-80361; HON. BERNARD A. FRIEDMAN)

NOW COMES Defendant, STEVEN C. STREEBING, by his attorney, Edward Wishnow, and respectfully requests an Evidentiary Hearing on Defendant's Motion To Dismiss the Indictment With Prejudice and in support thereof says as follows:

1. That Defendant, Steven C. Streebing, is charged in a 12 Count Indictment charging him with mail fraud in violation of 18 USC 1341 and false statements in violation of 18 USC 1001; all the Counts pertaining to the alleged scheme to defraud the United States Social Security Administration and the Aetna Life Insurance Company of disability benefits by the Defendant.

2. That on August 24, 1989, some twenty (20) months before the return of the instant Indictment, Defendant was interviewed in his home by a special agent of the Federal Bureau of Investigations, a special agent of the U.S. Department of Health and Human Services, and the industrial security chief for General Dynamics Land Systems, Defendant's employer.

3. That during the interview session of August 24, 1989, Defendant was advised by a special agent of the Federal Bureau of Investigation both directly and impliedly that if he cooperated and made a statement and told the agent what the agent wanted to hear,

there would be no prosection and there would no indictment.

4. That approximately 1½ hours of that interview has been memorialized by a video tape recording that is available for the Court to view at the evidentiary hearing requested herein.

5. That Defendant is entitled to the benefit of the promise and agreement made by the special agent of the Federal Bureau of Investigations in not being prosecuted and/or is entitled to being impliedly immune from prosecution based on the conduct and broken promises of the agent of the Federal Bureau of Investigations.

6. That the prosecution of Defendant in violation of the promises of the agent of the Federal Bureau of Investigations is a violation of due process and this Court should dismiss the indictment with prejudice under its supervisory powers.

WHEREFORE, Defendant, STEVEN C. STREEBING requests that he be granted a pretrial evidentiary hearing as to the dismissal with prejudice of the instant Indictment and after conducting a hearing, this Court dismiss the Indictment with prejudice.

Respectfully submitted,

EDWARD WISHNOW (P22472)
Attorney for Defendant
17117 West Nine Mile Road
Suite 1040
Southfield, Michigan 48075

Dated: June 13, 1991

MAGISTRATE'S REPORT AND RECOMMENDATION

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated August 6, 1991)

(UNITED STATES OF AMERICA, Plaintiff, v. STEVEN C. STREEBING, Defendant – CRIMINAL NO. 91-CR-80361-DT; HON. BERNARD A. FRIEDMAN)

Steven C. Streebing [Streebing], the Defendant, is charged in a twelve count indictment with mail fraud and false statements in connection with an alleged scheme to defraud the Social Security Administration and Aetna Life Insurance Company of disability benefits. On August 24, 1989, about a year and eight months before the indictment was returned, Streebing was interviewed at his home by an agent from the FBI, an agent from the Department of Health and Human Services, and a representative of General Dynamics, Streebing's employer. Streebing claims that the interview lasted for about four hours. The first hour and one half of the interview was taped on a video recorder concealed by Streebing, which he disclosed about fifteen minutes after the commencement of the interview. The recording establishes that during the interview, Streebing made inculpatory statements and admissions with respect to activities charged in the indictment.

Streebing, on motions to dismiss the indictment with prejudice and to suppress the statements, charges that during the August, 1989 interview he was told that if he cooperated and made a statement he would not be indicted or prosecuted, and that his statements were obtained by unlawful methods in violation of his due process.

On July 25, 1991, a hearing was held on Streebing's motions. At the hearing, in open court and on the

record, an Assistant United States Attorney indicated that the Government had no intentions of introducing the tape as evidence as part of its case. The Government declined, however, to enter into a stipulation that would prohibit the use of the tape for any purpose during the trial of this matter. The Government also represented that neither the tape, nor any information obtained solely from the tape, was presented to the grand jury in seeking the indictment.

Turning first to Streebing's motion to dismiss the indictment, it is the Government's position that no promises were made during the interview in question, and that in any event, Streebing has not suffered any demonstrable prejudice as the result of statements purportedly made in violation of his rights.

The one and one half hour video tape of the interview clearly demonstrates that the conduct of the FBI in obtaining statements from Streebing was egregious if not overtly outrageous.

It has been held that in the absence of any adverse consequences or "demonstrable prejudice" in the judicial process, dismissal of an indictment because of egregious pretrial behavior of government agents is not appropriate, *U.S.* v. *Morrison*, 449 U.S. 361, 365 (1980). In *Morrison*, agents unsuccessfully attempted to obtain the cooperation of an indicted, attorney represented defendant on another matter by approaching defendant without notice to the attorney, disparaging the attorney, promising benefits for cooperation, and threatening a stiff jail term for refusal to cooperate. In reversing a court of appeals finding that defendant's right to counsel has been violated and that dismissal of the indictment was proper regardless of whether or not defendant's representation at trial had been effected, the Supreme Court stated:

> Here, respondent has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings. There is no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted. The Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against respondent . . . , much less the drastic relief granted by the Court of Appeals. *Id.*, 366-367.

Thus, and in line with *Morrison*, this circuit has held that "[e]ven under circumstances where a constitutional right of the defendant has been violated, deliberately or otherwise, the defendant is entitled to the extreme sanction of dismissal of the indictment only where he can prove that he was demonstrably prejudiced by the violation." *U.S.* v. *Talbot*, 825 F.2d 991, 998 (6th Cir. 1987). The Government's claim that the tape was not viewed by the grand jury, and that information obtained solely from the tape was not presented to the grand jury, stands unchallenged by Streebing. As the matter now stands, therefore, Streebing has not shown any "demonstrable prejudice" flowing from the tape or its contents in connection with the return of the indictment in this matter.

During the discussion, the FBI agent strongly suggested that in exchange for Streebing's cooperation, there would be no indictment or prosecution. Looking at the interview from Streebing's perspective, *Grades* v. *Bodes*, 398 F.2d 409, 412 (4th Cir. 1968), the statements made by the FBI agent can be regarded as a direct or implied promise that there would be no prosecution if

Streebing cooperated. Streebing's argument that the indictment should be dismissed because of the existence of an agreement between the parties however, is not well founded. As already noted, the video taped portion of the exchange between Streebing and the FBI agent consisted of less than half of the totai conversation. Because of the fact that a larger portion of the confrontation was not recorded, it is all but impossible to conclude from a review of the video tape that Streebing and the agent arrived at a "meeting of the minds" that would have the result of reaching an agreement.

Streebing's argument that in consideration of the totality of the circumstances, this Court should "exercise its supervisory role in the fair administration of justice," is a plea that this Court exercise its discretion and dismiss the indictment. *In Re: John Doe*, 410 F.Supp. 1163, 1165 (E/D Mich., 1976), *U.S.* v. *Pascal*, 496 F.Supp. 313, 320 (N/D Ill., 1979); *U.S.* v. *Carrillo*, 709 F.2d 35, 37 (9th Cir. 1983). It is submitted, however, that given the current irrelevent status of statements that are part of the video tape in relation to the continued litigation of this matter and with due consideration of the inappropriate behavior of the FBI agent, such an extreme measure as dismissal of the indictment is not mandated.

Streebing's motion to suppress his statements made in the video tape as evidence is based upon the argument that the statements were not voluntarily, but "obtained as the result of unlawful government inducements, methods and stratagems . . . ," and that therefore the statements were obtained in violation of his due process rights and should be suppressed.

As already pointed out, the behavior of the FBI agent in conducting the interview was less than exemplary. The agents' behavior was overbearing and intimidating,

and again, from Streebing's point of view, coercive. Streebing's representations in his motion to suppress that the interview lasted about four hours, with only the first hour and one half captured on the video tape, is not disputed by the Government. To the extent that the first hour and one half of the interview is representative of the entire four hour interview (there being no indication from the Government that such is not the case), the totality of the circumstances clearly demonstrate that Defendant's will was overborne, Cf. *U.S.* v. *Murphy*, 763 F.2d 202, 205 (6th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986); that the confessions made by Streebing during the subject interview were not voluntary because his statements were extorted from him by the coercive activity of the FBI agent; that the coercion overbore Streebing's will; and that the agents' misconduct was crucial as a motivating factor in Streebing's decision to make the statements. *McCall* v. *Dutton*, 863 F.2d 454, 459 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). Contrary to its argument for denial of Streebing's motion to suppress the statements, the Government has not established by a preponderance of evidence that the statements were voluntary. *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972).

For the reasons indicated, it is respectfully recommended that Defendant's motion to dismiss the indictment be denied; and further that the Defendant's motion to suppress as evidence statements and confessions made by Defendant as contained in a video tape recorded at Defendant's home on or about August 24, 1989, be granted.

The parties are hereby informed that objections may be filed to this Report and Recommendation within ten (10) days after being served with a copy thereof as provided for in 28 USC § 636(b)(1)(C) and that failure to file

objections may constitute a waiver of any further right to appeal. *United States* v. *Walters*, 639 F.2d 947 (6th Cir. 1981) states that "a party shall file objections within the district court or else waive right to appeal."

Respectfully submitted,

/s/ Lynn V. Hooe, Jr.
United States Magistrate Judge

Dated: August 6, 1991

(Certification Omitted)

DEFENDANT'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION — *APPENDIX*

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated August 16, 1991)

(UNITED STATES OF AMERICA, Plaintiff, -v- STEVEN C. STREEBING, Defendant – Case No. 91-80361; JUDGE BERNARD FRIEDMAN)

* * *

APPENDIX
(TRANSCRIPT OF RELEVANT PORTIONS OF VIDEO TAPE OF AUGUST 24, 1989)

Excerpts From Video Tape of August 24, 1989:

SS – Steven Streebing
JS – Jay Sieger, Federal Bureau of Investigation
JP – John Pollock, U.S. Department of Health and Human Services

At approximately 3567 on video tape:

JS: I would like not to be involved in it too. Ok, but your [*sic throughout*] going to have a very very hard time making all of us go away, cause it's gotten so blown out of proportion. Now, you want to make a Federal case about this, you wanted, you want me to encourage and recommend to the United States Attorney

SS: No, I don't want to make a Federal case out of it, how do I get

JS: that you be indicted on all these counts?

SS: yeah but I don't understand

JS: Is that what you want me to do? Because I'll tell ya, my initial reaction with you, with you slamming that door on my face downstairs and coming up here

and playing these games with this recorder, I'm not leaving here without that tape. I'll come back here with a search warrant, and I'll get these records now and that tape with a search warrant. If you want to play games with me, your playing with the wrong person my friend.

SS: I don't want to play games

JS: Ok, you've only been collecting benefits for three years, I've been doing this business for fifteen. If you think you can beat me, if you want to challenge me, fine, consider yourself challenged my friend

SS: No, I don't want to challenge you, I just

JS: When I come to this job everyday, I can work whatever case I want to work, and right now you've become number one priority. Chicken Shit little case, your gonna go to the top of the pile. And when your friends get up and testify to the amount of time that you've been bragging to them about what you've been doing, then we'll see what the jury has to say. Now if you want to change your tune, you want to cooperate, you want this to go along nicely, we can do it one of two ways. Easy Way, Hard Way. Easy Way, ask me to get out of hear and I'll do everything that I can to present the facts of this to a grand jury, and we'll let a grand jury decide, and then we'll go to trial, and we'll let the trial decide, ok?

SS: That's the, you said that's the Easy Way?

JS: No, that's the Hard Way.

SS: I don't want to do it the Hard Way, I would rather like do it the Easy Way, and just

JS: I would like to do it the Easy Way too.

SS: Restitution, or whatever and make up for whatever I've done wrong, I don't

At approximately 4525 on video tape:

JS: Ok, then if you want to resolve it, when this man asks you why you put none, then you gotta tell him — I put none because I knew if I would have put something down there I wouldn't have got the benefits. That's what you gotta tell him.

JP: And not

SS: And then it won't go to court? And then

JP: No, let me put, let me put

SS: I just reimburse you guys, or whatever? or ah

JP: Steve, your gonna reimburse us, ok

SS: Can I, but will I be able to do it without going to court? or will

JP: I don't know that, I'm not a jury. All I am is an investigator

JS: Your Not Gonna Be Indicted, Your Not Gonna Be Indicted. Ok, if we go back to the United States attorneys office and we tell him, here's what we did, we went out and talked to this guy, he acknowledged what he did, he acknowledged violating federal law, ok, now Mr. Prosecutor, do you want to prosecute this man or not, that's gonna be his decision. If I go to him, after I, if you let me walk out of here today, and I go out and prove what I know we can prove, I'll guarantee you what will happen when we walk out with him, your gonna be prosecuted one way or another Steve, your going to have to face that, ok. Your either gonna be, we're either gonna go and ask for an indictment against ya, or your gonna come down and resolve it prior to that

time. By your telling us what your telling me today, and John today, is that you don't want to resolve it at this time. You'd rather wait until after charges are brought against you. And then resolve it.

SS: I'd rather resolve it now

JS: You rather resolve it now. Then for you to resolve it with us right now, John, what you've got to tell us is, when I wrote none, I knew by writing none, that I would continue to receive Social Security benefits, and I also know if I would have told them about the money I was making, I would not have received benefits, period. Ok, you know how to say that? And if you don't say it, were gonna prove it differently.

JP: But we're not gonna force it on you, we want you to voluntarily say that, if it's in fact true.

STIPULATION TO EXCLUDE DEFENDANT'S STATEMENTS

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated September 12, 1991)

(UNITED STATES OF AMERICA, Plaintiff, vs. STEVEN C. STREEBING, Defendant – CRIMINAL NO. 91-CR-80361; Honorable Bernard A. Friedman)

It is stipulated by the parties that neither party shall use at the trial of this matter any statements made by defendant Steven C. Streebing to government agents on August 24, 1989.

/s/ Edward Wishnow,
attorney for defendant
Steven C. Streebing.

/s/ Stephen T. Robinson,
Assistant U.S. Attorney

Dated: *9-12-91*

ORDER ADOPTING PARTIES' STIPULATION TO EXCLUDE DEFENDANT'S STATEMENTS

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated September 16, 1991)

(UNITED STATES OF AMERICA, Plaintiff, vs. STEVEN C. STREEBING, Defendant – CRIMINAL NO. 91-CR-80361; Honorable Bernard A. Friedman)

The government and the defendant have stipulated that neither party shall use at the trial of this matter any statements made by defendant Steven C. Streebing to government agents on August 24, 1989.

IT IS THEREFORE ORDERED that neither the government nor the defendant shall use at the trial of this matter any statements made by defendant Steven C. Streebing to government agents on August 24, 1989.

/s/ BERNARD A. FRIEDMAN
United States District Judge

Dated: Sep. 16, 1991

(Certification Omitted)

MEMORANDUM OPINION AND ORDER ACCEPTING IN PART AND REJECTING IN PART MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated September 16, 1991)

(UNITED STATES OF AMERICA, Plaintiff, vs. STEVEN C. STREEBING, Defendant – Criminal Action No. 91-CR-80361-01-DT; HON. BERNARD A. FRIEDMAN)

This matter is presently before the court on the August 6, 1991, Report and Recommendation of Magistrate Judge Lynn V. Hooe, Jr. Both parties have filed timely objections to this Report and Recommendation. The court shall review *de novo* those portions of the Report and Recommendation to which the parties have objected. *See* 28 U.S.C. § 636(b).

DEFENDANT'S MOTION TO DISMISS INDICTMENT

On June 14, 1991, defendant filed a motion to dismiss the indictment. Defendant now objects to Magistrate Judge Hooe's recommendation that this motion be denied.

Defendant argues that the court should dismiss the indictment under its supervisory powers because a special agent of the Federal Bureau of Investigation told defendant "both directly and impliedly that if he cooperated and made a statement and told the agent what the agent wanted to hear, there would be no prosec[u]tion and there would [be] no indictment." Defendant's Motion to Dismiss, para. 3. Defendant argues that his due process rights have been violated because the government has broken this promise;

defendant agreed to be interviewed on August 24, 1989, but is now being prosecuted.

As Magistrate Judge Hooe correctly noted in his [*sic*] Report and Recommendation, the court should not dismiss an indictment absent a showing that defendant "was demonstrably prejudiced by the violation." *United States* v. *Talbot*, 825 F.2d 991, 998 (6th Cir. 1987). Even assuming the FBI agent told defendant he would not be prosecuted if he cooperated (an assertion which the government strongly contests) dismissal of the indictment is a drastic remedy, which is appropriate only in truly egregious cases. *See United States* v. *Morrison*, 449 U.S. 361 (1980). Defendant has failed to show any such prejudice in this case.[1] Accordingly, the court shall accept Magistrate Judge Hooe's recommendation that defendant's motion to dismiss the indictment be denied.

DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

On June 19, 1991, defendant filed a motion to suppress all of the statements he made during the August 24, 1989, interview. The government objects to Magistrate Hooe's recommendation that this motion be granted.

On September 12, 1991, the parties tendered to the court a stipulation that none of the statements in question will be used at trial. This stipulation renders moot defendant's motion to suppress as well as the government's objection to the magistrate's recommendation. Accordingly, the court shall reject Magistrate Hooe's recommendation that defendant's motion to suppress be granted, and shall instead deny the motion as moot.

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[1] **While plaintiff might well have been prejudiced if the statements he made during the August 24, 1989, interview were to be used as evidence against him, any such prejudice has been nipped in the bud by the government's stipulation not to use any of these statements at trial. The Assistant United States Attorney has also indicated that these statements were not presented to the grand jury.**

For these reasons,

IT IS ORDERED that Magistrate Judge Hooe's Report and Recommendation dated August 6, 1991, is accepted in part and rejected in part as follows: defendant's motion to dismiss the indictment is denied; defendant's motion to suppress statements is denied as moot.

/s/ BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: Sep. 16 1991
Detroit, Michigan

(Certification Omitted)

ORDER GRANTING STAY OF MANDATE

(United States Court of Appeals — Sixth Circuit)

(Filed March 25, 1993)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN C. STREEBING, Defendant-Appellant – Case No: 92-1154)

Upon consideration of the appellant's motion to stay the issuance of the mandate pending application for a writ of certiorari to the U.S. Supreme Court,

It is ORDERED that the motion be, and it hereby is, GRANTED.

The mandate shall be stayed for 30 days from the date of this order.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk